

FINANCIAL INSTITUTIONS COMMITTEE MEETING
Business Law Section, State Bar of California

Meeting of October 10, 2006

Committee Members Present: John Hancock, Chair; Rosie Oda, Secretary; Bruce Belton; Laura Dorman; Andrew Druch; Jim Dyer; Bart Dzivi; Elaine Lindenmayer;; Todd Okun; Allan Ono; Mary Price; Brad Seiling; Will Stern; and Keith Ungles.

Advisory Members and Others Present: Sally Brown; Clay Coon; Bob Mulford; Michael Occhiolini; Jim Rockett; and Neil Rubenstein.

Committee Members Absent: Michael Abraham; Leland Chan; Andy Erskine; Mark Gillett; Jay Gould; Rob Hale; Linda Iannone; Randy Kennon; Rosemary Lemmis; Teryl Murabayashi; Russ Schrader; Bob Stumpf; Meg Troughton, Vice Chair; Mike Zandpour.

Call to Order: Our Chair John Hancock of Rabobank called the meeting to order at 9:35 a.m.

Welcome to Members and Advisory Members: John welcomed the Committee Members and the Advisory Members and asked each person to identify themselves and where they worked.

1. Approval of September 12, 2006 Minutes: The Committee approved the minutes of the September 12, 2006 meeting.

2. *Hood v. Santa Barbara Bank & Trust*, 2006 WL 2773467: Will Stern of MoFo reported on this recent California appellate court preemption decision which has broader implications. The case involves a class action suit brought by borrowers who got tax refund anticipation loans against certain national banks. The court analyzed the OCC's preemption regulations and said they did not apply. It found: (1) no visitorial powers issue because this is a private action; (2) the Rosenthal Debt Collection Act and Bus. & Prof. Code 17200 had only an incidental effect on banking and thus were not preempted as to banks; (3) OCC deposit taking regulations did not preempt state law because these violations are based on Truth in Lending Act & Fair Debt Collection Act violations; and (4) the non-real estate lending regulations don't apply. Certain tax preparation services would arrange for the RAL proceeds to be made by and then deposited in defendant banks. The banks in this case made RAL applicants subject to cross-collection provisions with other lenders, a feature which allows the prior year's lender to get paid off first. (In the case of Santa Barbara, no loan was made and the tax refund was applied to a prior loan made by another bank.) Will believes there may be a possible negative impact on future preemption cases concerning "referred" or other indirect loans, such as occur in mortgage lending.

There was some discussion that it was unlikely that the OCC would file an amicus in this case for political reasons. Bob Mulford of the Fed commented that these are terrible

facts, and that it is abusive for the OCC to allow banks to act as collection agent for other banks in this manner. Neil Rubenstein of Buchalter also commented that this does not impact safety and soundness and is not really what federal regulators are dealing with.

3. Americans with Disabilities Act: Bruce Belton of Tri Counties Bank discussed another recent case, *National Federation of the Blind v. Target Corporation*, No. C 06-0182, which was heard in the Northern District of California by Judge Patel. The ADA was essentially applied to a service rather than a physical location when J. Patel found Target.com is not accessible to blind individuals, and thus the blind are denied full and equal access to Target stores (such as being unable to find out about advertised sales). The website lacked alternative text which would allow a blind person to use screen reading software to vocalize the text. The court thus refused to dismiss on this basis but noted that reasonable accommodation (such as a phone bank) could be argued later as an affirmative defense. Bruce's report was followed by a discussion as to why Target had fought a suit when it might only have cost \$40,000 to provide the alternative text. Our Chair John Hancock explained that while under development, such a feature could be added cheaply, once the website is operational, it could cost millions to fix it. With respect to ATMs, John pointed out that ATMs installed before the ADA are not required to be retrofitted with ear jacks for the blind. John noted that settlements are published by advocacy groups on websites and that bank counsel would be wise to track prevailing settlements on the internet.

4. Dunham & Assoc. Holdings, Inc.: Elaine Lindenmayer of Kirkpatrick & Lockhart reported on this recent SEC enforcement action, SEC Rel. No. 54489 (Sept. 22, 2006), concerning common trust funds, for which her firm has prepared an Alert. Dunham Trust Company, a Nevada state-chartered trust company, served as trustee for a common trust fund. Investors who qualified as accredited investors could invest in limited partnerships organized by another subsidiary of Dunham, which was a registered broker-dealer and investment adviser, and which solicited investors directly and hired third party brokers and advisers to find other investors. If they did not qualify, customers could invest in the common trust fund which directed investments in sub-funds exclusively in the limited partnerships. The limited partnerships and the common trust fund were not registered under either the Investment Company Act of 1940 or the Securities Act of 1933. The SEC characterized this as a public offering, and treated the trust company as a conduit. Although it did not question the validity of revocable trusts, the SEC commented that they are not generally established for a fiduciary purpose.

5. Financial Services Regulatory Relief Act: Elaine also reported on a couple of aspects of this legislation, which was passed by both Houses on September 27, 2006: (1) the treatment of thrifts, and (2) the SEC's Proposed Regulation B. Under this legislation, thrifts will now be treated equally with banks with respect to the eleven broker-dealer exemptions that became available to banks after the former bank exemptions under the Investment Company Act, the Investment Advisers Act and the Securities Exchange Act of 1934 were repealed by the Gramm-Leach-Bliley Act in 1999. The legislation requires that the SEC and the Federal Reserve jointly adopt a single set of rules within 180 days after enactment and seek concurrence from the Federal banking agencies prior to its

adoption. Elaine provided some background on Proposed Regulation B and reported that the SEC extended the temporary exemption for banks and thrifts until January 15, 2007. Chairman Cox has indicated that the SEC plans to propose a new rule by the end of the year. There was some discussion as to whether the President had signed the bill into law. [After the meeting, Bart Dzivi confirmed that the President is expected to sign the bill this week.]

6. State Legislative Report: Bob Mulford reported that all pending legislation of interest to bankers was signed by the Governor except for SB 1489 on recoveries of attorneys fees when the Attorney General prevails in a civil action. The bill would have prohibited the Attorney General from hiring private counsel under contingency fee arrangements in certain circumstances.

7. Federal Legislative Report: Bart Dzivi reported that there are no indications as to possible lame duck legislation. He also commented that we will have a whole new ballgame after the election even if the Republicans retain majority status since Bill Frist is resigning as leader, and Hastert's status is in doubt. There will also be turnover on the Banking Committees.

8. New Committee Leaders: John described the usual track for leadership of the Financial Institutions Committee, and then explained that Meg Troughton of BofA, our Vice Chair, would remain Vice Chair for another year, switching the Chair position with Rosie Oda of Pillsbury, and that Bruce Belton had been selected as the next Secretary. He read a message from Meg, after which several members expressed their best wishes for Meg, who will become Chair next year. John thanked Meg and Rosie for their service during his year as Chair. He welcomed our new class of members and asked all members whose terms were expiring to let Rosie know if they wished to continue as advisory members.

9. Gratitude for our Chair's Service: Rosie then presented John with an engraved clock, which Meg had suggested to commemorate his service as Chair and which Rosie arranged with the Bar. The members gave John a round of applause to thank him for his great efforts this year to keep all of us informed of the latest developments in financial institutions law.

10. Adjournment: The meeting was adjourned at 10:30 a.m.